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No. 82-432

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

LOCAL No. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL No. 82; GEORGE HARRIS, PRESIDENT, LOCAL No. 82; PHILLIP PIEMONTESSE, CHAIRMAN, LOCAL No. 82 ELECTION COMMITTEE; and JOHN DOE, JAMES DOE, and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL No. 82,

Petitioners,

and,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

MOTION OF ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF, AND BRIEF IN SUPPORT OF RESPONDENTS

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MOTION OF ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Association for Union Democracy ("AUD") respectfully moves this Court, pursuant to Rule 36.3, for leave to file a brief as amicus curiae in support of the respondents. Consent to file this brief was granted by the intervenor and respondents, but withheld by the petitioners.

The Association for Union Democracy is a tax exempt, New York corporation which was classified as a non-private foundation in 1971 by the Internal Revenue Service. The Association's primary objective, as its name suggests, is to promote democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal affairs of unions, and by protecting the exercise of democratic rights within unions. The Association was founded in the realization that no other organization devotes itself primarily to this objective.

The Association does not take sides in internal union disputes over policies, programs, or candidates. It does, however, propose that the rivalries and antagonisms which arise in the labor movement, as in other social institutions, be resolved through democratic procedures and the due process of law.

The sponsors of the Association include a broad cross section of citizens, including many union members, educators, religious leaders, lawyers, students and supporters of the union movement. They share the view that the labor movement is one of the forces in our pluralistic society which helps to sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal life.

Over the 15 years of its existence, the Association has accumulated a wealth of knowledge and insight concerning the difficulties many union members encounter when attempting to exercise democratic rights within their unions. In its brief, the Association will share these insights and advocate a more expansive position than the one adopted by the court of appeals. Because respondents will presumably defend the decision below, this position

would not otherwise be presented for the Court's consideration.

Respectfully submitted,

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---

BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The interests of *amicus curiae* are set forth at pages 1 to 3 of the foregoing motion for leave to file a brief.

SUMMARY OF ARGUMENT

Although there is some overlap between the rights conferred upon union members in Titles I and IV, these rights do not compete with, but rather complement, one another. Rather, the tension between the two Titles arises in their very different enforcement schemes. Although

some early decisions held that where there was an overlap, *Calhoon v. Harvey*, 379 U.S. 134 (1964), required the courts to withhold, or substantially limit, their jurisdiction to remedy Title I violations, the great weight of more recent authority, including the decision below, has properly held that Title IV does not preempt the courts' jurisdiction under Title I.

The key to resolving the tension lies in recognition of the limitation of section 403 of Title IV which declares that the "exclusive" remedy for violations of that Title shall be the invalidation of elections "already conducted." 29 U.S.C. § 483. After that language was reported out of committee, Title I, together with its own enforcement scheme, was added to the bill in order to enhance the democratic rights and remedies of union members which the legislators found to be insufficiently protected in the committee bill. Unlike Title IV, where only one remedy is available and only under certain circumstances, Title I confers upon district courts broad authority to fashion "such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

Although Congress did not explicitly consider the interplay of the remedial schemes in the two Titles, there can be little doubt that the courts may not remedy a Title I violation by invalidating an election "already conducted," and ordering a new election. However, that is the only form of relief that would be barred as an "inappropriate" means of remedying Title I violations. Thus, petitioners' claim that district courts have no jurisdiction to remedy Title I violations that occur in an election context, or may affect an election, must be rejected. And in this case, the district court did not exceed his discretion when fashioning relief for the union's violation of members' Title I rights to nominate and vote for candidates of their choice by freezing an ongoing election and obtaining the union's consent to run a fair election without offending its members' Title I rights.

ARGUMENT

IN PROTECTING UNION MEMBERS' TITLE I RIGHTS WHICH MAY OVERLAP TITLE IV RIGHTS, THE ONLY REMEDY NOT AVAILABLE TO A TITLE I COURT IS THE "EXCLUSIVE" TITLE IV REMEDY.

Introduction

The primary issue decided below was "whether the district court had jurisdiction under Title I of the LMRDA . . . or whether . . . the plaintiffs' only recourse was to the Secretary of Labor under Title IV of the Act." Pet. App. 42-59. The court below found that, despite the overlap of substantive rights in Titles I and IV, it had jurisdiction over the respondents' action, a holding which is directly challenged in this Court only by petitioners, not by the Secretary of Labor or the *amicus,* AFL-CIO.

The thrust of petitioners' argument is that Congress intended to preclude any intrusion by the courts into union elections except after they had been conducted, and then only in suits brought by the Secretary of Labor to set aside the election. According to petitioners, the enforcement scheme in Title IV preempts courts from hearing, or at least from remedying, Title I violations that occur during, or at least relate to, union elections. Although the Secretary and the AFL-CIO do ultimately concede in a backhanded manner that federal courts have jurisdiction over Title I actions regardless of the pendency of elections, they suggest that the courts' injunctive authority is, for all intents and purposes, substantially limited despite very clear language in Title I authorizing courts to award "such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

This brief will demonstrate that this broad ranging view of the preemptive effect of Title IV, which is based upon

Calhoon v. Harvey, supra, is incorrect. To do so, it is necessary first to review the language and legislative history of Titles I and IV before discussing *Calhoon* and suggesting an appropriate means of resolving the tension between the enforcement schemes in the two Titles.

The Provisions In Titles I and IV Creating The Tension

In Title IV, the Congress set out many procedural rules to govern union elections. Among the rules imposed by section 401 is an obligation to have periodic, secret ballot elections, to refrain from using union funds to promote candidacies, to distribute campaign literature at a candidate's expense, and to permit all candidates to have poll watchers. The section also contains the following language which was subsequently echoed in the Title I Bill of Rights when it was appended to the statute just prior to enactment:

> In any election...a reasonable opportunity shall be given for the nomination of candidates and every member in good standing...shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind...Sec. 401(e), 29 U.S.C. § 481(e).

In contrast to the specific delineation of rights and procedures in Title IV, Title I was written more generally and modeled after the Bill of Rights in the U.S. Constitution. *United Steelworkers of America v. Sadlowski,* 457 U.S. 102, 111 (1982). For example, it extends to union members' due process protections, the right to set their own dues levels, and to initiate legal actions against their unions. Also contained in Title I are the following rights which overlap similar rights in Title IV:

> Every member of a labor organization shall have equal rights and privileges...to nominate candidates,

> to vote in elections or referendums...Sec. 101(a)(1), 29 U.S.C. § 401(a)(1).
>
> Every member of a labor organization shall have the right...to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in any election of the labor organization or upon any business properly before the meeting...Sec. 101(a)(2), 29 U.S.C. § 401(a)(2).

Thus, when members engage in the process of nominating candidates for office, expressing their views on candidates and voting — at least in elections for officers as opposed to referenda on such matters as dues increases, bylaw amendments or contract ratifications — their conduct may be protected by both Titles I and IV.

The tension in the law stems from the very different enforcement schemes adopted by the Congress for remedying violations of the two Titles. Congress gave union members the right to initiate suits to vindicate their Title I rights and authorized courts to award "such relief (including injunctions) as may be appropriate." No limitations were placed upon when Title I suits could be brought; nor were any limitations directly imposed upon the type of remedies that could be awarded. *See* section 102, 29 U.S.C. § 412.

In contrast, the Congress elected in Title IV not to remedy every violation of the Title IV election requirements. Only when violations may actually have affected the outcome of an election did the Congress conclude that the entire election should be set aside, and a new election run under the supervision of the Secretary of Labor. And, to shield unions from frivolous suits, the Congress delegated to the Secretary a screening function and the exclusive authority to initiate suits under Title IV to set aside elections. *See* section 402(b) and (c), 29 U.S.C. § 482(b) and (c).

The problem arises if a federal court concludes that the best way to vindicate members' Title I rights infringed during a union election would be to set aside the election after it had been completed and require the union to conduct a new election. But that option would appear to be foreclosed whenever the election is one governed by Title IV since Congress declared that "[t]he remedy provided by [that] title for challenging an election already conducted shall be exclusive." Section 403, 29 U.S.C. § 483. What is less certain is whether, as petitioners contend, this language was intended to preempt Title I entirely in any matter touching on union elections or whether it simply confines the remedies available for Title I violations. And if a Title I court may award relief which affects union elections, what are the boundaries upon either the timing or the substance of the relief? To answer these questions, the legislative history of the two Titles must be examined.

The Relevant Legislative History of Titles I and IV

When enacting the LMRDA, the Congress declared that its recent investigations of unions had disclosed

> a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation....

Section 2(b), LMRDA, 29 U.S.C. § 401(b). Senator McClellan put it more bluntly. "The situation is sickening," he said, "hoodlums and racketeers" have "infiltrated certain unions." 105 Cong. Rec. 5806 (1959), II Leg. Hist. 1098.[1] Expressing Congressional sentiment, he proclaimed:

> If unions are to have such federally bestowed, tremendous powers in industrial government, they

[1] "Leg. Hist." refers to the *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, the two volume edition compiled by the National Labor Relations Board.

> should be compelled by law to represent their members in accordance with democratic principles and to accord to them the basic rights of liberty, freedom, and justice.
>
> * * * * *
>
> I do not believe that unions in our society are supposed to be, or that they should be, permitted to be the masters of the members. Unions should be the servants.

Id. at 5806-07.

The statute was constructed over a lengthy period bridging two different sessions of Congress. It was "the product of conflict and compromise between strongly held and opposed views." *Wirtz v. Glass Bottle Blowers Ass'n,* 389 U.S. 463, 468 (1968). As a result, Professor Archibald Cox, "a principal consultant to the draftsmen,"[2] cautioned:

> The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of words.

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 852 (1960). Whatever else may be said, it cannot be disputed that the overriding Congressional objective when enacting the LMRDA was to guarantee that all unions would be democratic institutions and thus to enable members to oust corrupt officials and govern themselves.

Unfortunately, the petitioners and their supporters often lose sight of this overriding goal by focusing upon a

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[2] *Trbovich v. United Mine Workers,* 404 U.S. 528, 535 (1972).

few individual trees in the legislative forest. For example, there is no want of legislative history reflecting the solicitude of the principal draftsmen of the LMRDA for unions' need to avoid unnecessary government intrusion in their internal affairs.[3] The Title IV election provisions were the product of such concern, and they were enacted as drafted. However, in the final analysis this aspect of the legislative history is misleading because it is incomplete.

As originally drafted in S. 505, which was introduced by Senator Kennedy on January 20, 1959, the election provisions would have preempted all preexisting rights and remedies available to union members under state law. I Leg. Hist. 64-65, § 303. However, when the bill was reported out of committee on April 14, 1959 as S. 1555, it contained new language which provided that "[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." *Id.* at 378, § 303. Nonetheless, the full Senate was dissatisfied; it believed that even this bill did not go far enough to assure democratic processes within unions. As this Court recently recognized in *Steelworkers v. Sadlowski, supra,* 457 U.S. at 109, 112:

> Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leader ship. * * * Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of elections.

Accordingly, Senator McClellan offered a "Bill of Rights of Members of Labor Organizations" in the form

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[3]For example, Senator Kennedy, the principal author, was concerned "that only essential standards should be imposed by legislation . . . [and] great care should be taken not to undermine union self-government." S. Rep. No. 187, 86th Cong., 1st Sess., p.7 (1959).

of a floor amendment which was adopted on April 22nd by a vote of 47 to 46. Like the election provisions, his amendment delegated to the Secretary of Labor the authority for initiating enforcement actions. However, despite the Senate's concern for protecting union members' basic civil liberties,"strong sentiment for modification [of the McClellan bill of rights] immediately sprang up."[4] During the next two days a compromise was drafted and introduced by Senator Kuchel in the form of a substitute amendment which was adopted by an overwhelming margin of 77 to 14. 105 Cong. Rec. 5997-98, 6030 (1959), II Leg. Hist. 1220-21, 1239.

During the floor debate on his amendment, Senator Kuchel pointed out "one of the major changes in the proposal":

> The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf.

105 Cong. Rec. 6023 (1959), II Leg. Hist. 1232. Senator Clark, a participant in drafting the amendment, explained the modification more poignantly: "it takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts." 105 Cong. Rec. 6024 (1959), II Leg. Hist. 1233. Senator Kefauver congratulated the sponsors for removing the Secretary of Labor from "the middle of the actions of every labor union in the United States." 105 Cong. Rec. 6029 (1959),

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[4]Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 832-33 (1960).

II Leg. Hist. 1238. Thus, even though there is an overlap between Titles I and IV, by giving members direct access to the courts, and by giving courts broad discretion to award "such relief (including injunctions) as may be appropriate," Congress could only have intended to strengthen what it considered to be the inadequacies in Title IV. *See Steelworkers v. Sadlowski, supra,* 457 U.S. at 117 n. 10.

Indeed, in *Hall v. Cole,* 412 U.S. 1 (1973), the Court considered the question of remedies available under Title I. The court noted that the other LMRDA Titles

> deal with narrowly defined problems under the Act, and specifically authorize...limited remedies...By contrast § 102 was premised upon the fact that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting of almost infinite variety," and § 102 was therefore cast as a broad mandate to the courts to fashion"appropriate relief." Indeed, any attempt on the part of Congress to spell out all the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.' "

Id. at 10-11 (citations and footnotes omitted).

The legislative history of Title I and its remedial scheme does not reflect Congressional concern for protecting unions from litigation.[5] It does not reflect solicitude for

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[5]Each of the LMRDA's different titles contain their own, very different enforcement schemes. In addition to the differences between the Title I and IV schemes already discussed, it should be noted that there is a mandatory exhaustion period of 90 days in Title IV, and a permissive exhaustion period of 120 days in Title I. *See Detroy v. Am. Guild of Variety Artists,* 286 F.2d 75 (2d Cir.), *cert. denied,* 366 U.S. 929 (1961). The Title II reporting and disclosure provisions are enforced primarily by the Secre tary, but members can also sue to require that their unions make available for inspection their financial

the Secretary's expertise in recognizing, screening, or remedying Title I violations, particularly with the one blunt instrument made available by Title IV.[6] On the contrary, it reflects a very deliberate intention to expand the democratic rights of union members and to assure that they would be enforced, particularly in an electoral context when members' civil rights are most precious, and most likely to be infringed. *See Steelworkers v. Sadlowski, supra.*

Accordingly, petitioners place the cart before the horse to the extent they argue that greater weight should be assigned to the legislative history reflecting the draftsmen's objectives in Title IV than objectives of the full Senate when later adopting Title I, by an overwhelming majority, in order to enlarge the democratic protections found wanting in the committee bill. Whatever merit there may be to petitioners' claim that "Title I rights were [not] intended to be superior in importance to those set forth in Title IV," Pet. Br. at 25, there is no basis to suggest that the Congress intended them to be inferior, or that they should be even temporarily eclipsed by Title IV when infringed during an election season, except where Congress clearly and explicitly provided.

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records with the only apparent condition being demonstration of "just cause." *See* § 201(c), 29 U.S.C. § 431(c). Members may initiate litigation under Title III to lift trusteeships. *See* § 304, 29 U.S.C. § 464. Finally, Title V authorizes members to sue their union officers for breach of fiduciary duty; the only condition is that they must give the union an opportunity to initiate appropriate proceedings to remedy the breach. *See* § 501(b), 29 U.S.C. § 501(b); *Purcell v. Keane,* 406 F.2d 1195 (3d Cir. 1969).

[6] In *Wirtz v. Glass Bottle Blowers Ass'n,* 389 U.S. 463 (1968), the Court recognized that "no exceptions are admitted by the unambiguous wording [of § 402] that when 'the violation of § 401 may have affected the outcome of an election, the court *shall* declare the election, if any, to be void and direct the conduct of a new election under the supervision of the Secretary . . .' " *Id.* at 468 (emphasis in original).

***Calhoon* And Its Aftermath**

Shortly after enactment of the LMRDA, this Court decided *Calhoon v. Harvey*, 372 U.S. 134 (1964), a case initiated by a union member who alleged that his union's constitution infringed his section 101(a)(1) right to nominate candidates because it provided that members could nominate only themselves. The Court concluded, however, that section 101(a)(1) only guaranteed members "equal rights" — it is "no more than a command that members and classes of members...not be discriminated against in their right to nominate and vote." *Id.* at 139. Because the suit sought to challenge the rule which had been uniformly applied to all members, the Court held that the lower court lacked jurisdiction under Title I. Once the Court found that the complaint had failed to state a cause of action under that section, that should have been the end of the matter. As it turned out, *Calhoon* did not involve an overlap between Titles I and IV.

Nonetheless, in the majority opinion, Justice Black went on to state that "Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials and provides its own separate and different administrative and judicial procedure for challenging those standards." *Id. at 138.* The opinion notes that Congress decided "to utilize the special knowledge and discretion of the Secretary of Labor," and "to allow unions great latitude in resolving their own internal controversies," and "not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV." *Id.* at 140. Thus, *Calhoon* did not hold that whenever union conduct violates both Title I and Title IV, the courts are preempted from remedying the violation under Title I. To the contrary, the Court clearly held "that possible violations of Title IV...are not relevant in determining whether or not a district court has jurisdiction under § 102 of Title I of the Act." *Id.* at 139-40. However, in a concur-

ring opinion, Justice Stewart gave credence to this notion by suggesting that "by construing Title IV to foreclose absolutely pre-election litigation in the federal courts, the Court sharply reduces meaningful protection for many of the rights which Congress was so assiduous to create." *Id.* at 146.

Justice Stewart was not alone in reading the majority opinion as preempting district court jurisdiction under Title I whenever Title IV rights were also implicated. For example, in *Driscoll v. Operating Engineers Local 139,* 484 F.2d 682 (7th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974), a union bylaw requiring candidates to file an anticommunist affidavit was challenged as violating both the free speech and equal protection provisions of Title I. Relying on *Calhoon,* the Seventh Circuit held that the Title I remedy was precluded because of the overlapping coverage of Title IV and hence that the complaint should be dismissed for want of jurisdiction as long as it "basically related" to a matter covered by Title IV. *Id.* at 686. The court concluded that "Congress mandated...that the Secretary of Labor act as a clearinghouse for any litigation concerning union election policies." 484 F.2d at 689.

The Second Circuit adopted a more moderate position in *Schonfeld v. Penza,* 477 F.2d 899 (2d Cir. 1973). Although it found that a would-be candidate could not challenge his removal from office, and consequential ineligibility to run for office, in a Title I suit, the court did find that "[w]hen the rights of free speech and of association — as opposed to the rights of voting and election — of union members are invaded by the actions of union officers, the requirement of initial appeal to the Secretary under Title IV is inapplicable." *Id.* at 903. However, out of deference to this Court's opinion in *Calhoon,* the court added:

> The competing values between Title I rights and Title IV procedural requirements are best reconciled, in

> our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union.

Id. at 904.

Other courts have been unconcerned about weighing "competing values." In *Depew v. Edminston*, 386 F.2d 710 (3d Cir. 1967), a case involving the section 101(a)(1) equal protection provision, the court held that it need only determine

> whether or not a union member has been discriminated against in one of the rights enumerated in § 101(a)(1). If such discrimination is present, a cause of action exists under § 101(a)(1) regardless of other claims [under Title IV]; absent such discrimination, the courts have no such jurisdiction.

Id. at 712. *See also Kupau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980); *McNail v. Amalgamated Meat Cutters*, 549 F.2d 538, 540 (8th Cir. 1977). And, in the opinion below, the First Circuit adopted this approach and concluded that "the different purposes that Congress sought to have Titles I and IV serve do not require...that a federal district court be foreclosed from taking jurisdiction of a Title I claim in an election [context]...Title I rights are not rights as to which the Secretary has particular expertise, so it is unnecessary for him to perform a screening function." Pet. App. 59. Although the court held that the touchstone of a § 101(a)(1) violation was simple discrimination, it embraced the *Schonfeld* holding that only a "purposeful and deliberate" attempt by union officials to suppress dissent would state a § 101(a)(2) violation in an election context. Pet. App. 61.

It is the view of *amicus* that these broad readings of *Calhoon* are not justified. The result has been to withhold

or deny relief for Title I violations. The potential tension between Titles I and IV can be reconciled far less drastically than some lower courts have suggested and can be done in a manner which preserves Congress' intent to protect members' rights under Title I during elections as well as in other circumstances.

Resolution of the Tension

As we have already seen, Congress amended S. 1555 by adding Title I in order to augment both the rights and remedies available in that bill, including the provisions which ultimately became Title IV. If Title I has been violated, whether the violation is "purposeful and deliberate" or not, the violation must be remedied regardless of whether the conduct may also have violated Title IV.[7] In *Calhoon,* this Court observed that "Section 402 of Title IV...sets up an exclusive method for protecting Title IV rights." 372 U.S. at 140. It did not hold that the section was also intended to protect Title I rights. Title I contains its own, very separate enforcement scheme from which the Secretary of Labor was very deliberately exclud-

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[7]This point is grudgingly conceded in as inconspicuous a manner as possible by petitioners, the Secretary of Labor and the AFL-CIO. Petitioners contend that "the issue in this case is not whether a district court has any authority to remedy Title I violations in a pre-election context but, rather, whether that authority extends so far as to include ordering a union to rerun its election." Pet. Br. at 29. Implicit in this claim is the suggestion that Title I courts do have some authority to remedy violations at least in a pre-election context.

The Secretary of Labor acknowledges that "some election violations may contravene both Titles I and IV. In those circumstances, while some kinds of relief under Title I may be appropriate, a new election may be ordered only under Title IV." DOL Br. at 10.

Coming even closer to the mark, the AFL-CIO states that "Section 403 does not distinguish between suits brought before and suits brought after an election has been conducted. * * * Thus, for example, a [Title I] suit brought after all ballots have been tabulated and the result announced is not precluded by Title IV if the suit is one for damages on account of election-related misdeeds or is one to restrain misconduct from recurring in the future." AFL-CIO Br. at 6, n. 3.

ed.[8] It cannot be seriously contended that Congress intended the Title IV enforcement provisions to function to suspend, limit or deny federal court jurisdiction to remedy Title I violations whenever they occur, or whenever the relief is sought, whether pre-election, during an election, or post-election. Were the law otherwise, this Court might well have been without jurisdiction to have decided *Sadlowski.*[9]

At the outset, therefore, it is important to recognize that the tension between Titles I and IV does not affect the jurisdiction of Title I courts. The tension stems from the effect a Title I remedy may have upon an election governed by Title IV where the Congress declared that only the Secretary of Labor could sue to set aside elections. The problem is that the exclusive remedy available under Title IV — wholesale invalidation of an election — may be too much, too little, or too late to remedy a Title I violation; indeed, as the court noted below, it may not even be available unless the Title IV violations might have affected the outcome of the election. *See* Pet. App. 65-66. It can scarcely be said that this result was intended by Congress.

Some of the confusion can be traced to *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972), where this Court noted that the reason the Congress declared that the post election remedy under Title IV was to be exclusive was to protect unions by screening out frivolous claims, and by consolidating in a single proceeding all meritorious

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[8]To the contrary, Congress deliberately exempted Title I violations from the Secretary's investigatory authority in section 601(a), 29 U.S.C. § 521(a).

[9]The Court expressly rejected the union's argument that the outsider contribution rule at issue need be considered solely under Title IV. It held that "even if the rule satisfies § 403, it must also satisfy Title I" which, the Court noted, was "adopted precisely because Congress feared that Titles II through VI did not provide sufficient protection to union members." 457 U.S. at 117-18 n. 10.

claims under that Title. *Id.* at 532.[10] However, this observation has no application in the Title I context where the Congress deliberately removed the Secretary from the enforcement scheme. Indeed, in *Trbovich*, the Court clarified that Title IV only "prohibits union members from initiating a private suit to set aside an election." *Id.* at 531. Although the Congress never directly dealt with the interplay between Titles I and IV,[11] and clearly intended only to preempt state courts from setting aside elections after they had been completed, it would be consistent with Congress' intention to extend this prohibition to post-election Title I courts as well.

Petitioners, however, go much further when they contend that Title IV was "the special 'vehicle' through which Congress sought to insure democracy in elections . . . [and] the exclusive federal remedy adopted by Congress to resolve disputes concerning elections of officers was for the union to conduct a supervised election." Pet. Br. at 25-26. This simply is not true. Even before Title I was conceived, Congress made specific allowance for pre-election suits. Section 401(c) of Title IV gives candidates (not members) a right to sue in federal district court to compel unions to honor their rights under that section, *e.g.*, to have their campaign literature distributed. 29 U.S.C. § 481(c). To enforce this right, it may be necessary for a court to postpone an election, or enjoin it until the union fulfills its statutory obligations.

Section 403 clarified that while the Title IV enforcement scheme was to be the exclusive means of challenging an election already conducted, "[e]xisting rights and

[10]Such screening is particularly appropriate given the high cost in dollars and uncertainty that would result if any disappointed candidate could sue to overturn elections.

[11]*See* Secretary's Br. at 13. For an excellent discussion of the legislative history, see Note, *Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 Chic. L. Rev. 166, 175-179 (1974).

remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." 29 U.S.C. § 483. Thus, for example, prior to enactment of the LMRDA, even if a union constitution did not contain a reasonable election notice requirement, state courts would imply such a requirement. *See generally* Summers, *Judicial Regulation of Union Elections,* 70 Yale L. J. 1221 (1961). In remedying violations of constitutions and bylaws, whether explicit or implied, state courts frequently postponed the election or enjoined it until the violation was corrected. *Ibid.* In addition, a number of union constitutions require the election of officers at shorter intervals than required in the LMRDA. Were the union to refuse to comply with its constitution, Title IV would afford no apparent remedy. However, the members could sue in state court to compel an election. And, given the traditional equity powers of the court, particularized election procedures or court supervision of the election could be ordered, all without an impermissible invasion of the Secretary's exclusive jurisdiction under Title IV.[12]

So also might a federal court properly become involved in the electoral process after invalidating a trusteeship under Title III of the LMRDA. Such suits may be brought by members and, once again, the court might find it appropriate to impose special rules on the conduct of the election, or even to supervise the election, all without any participation by the Secretary, or invasion of the Secretary's authority under Title IV. *See, e.g., Schonfeld*

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[12]For example, Local 306 of the Moving Picture Machine Operators sheduled an interim election for its business manager on June 1, 1983, to be held at the union hall at a time when a segment of the membership could not attend and vote. By order of May 31st, U.S. District Judge Robert J. Ward ordered the union to postpone the election, and conduct it under the auspices of an impartial supervisor. *Dolan v. Local 306, Moving Picture Machine Operators,* (S.D.N.Y. No. 83-CIV-4043).

v. Raftery, 271 F. Supp. 128, 148 (S.D.N.Y.), *aff'd,* 381 F.2d 446 (2d Cir. 1967).

In fact, the Title IV role and expertise of the Secretary of Labor have been overstated by petitioners, by the AFL-CIO, and, as might be expected, by the Secretary. In recognition of the administrative expertise of many regulatory agencies, the Congress often confers broad discretion to construe and apply various laws. In the case of the LMRDA, however, Congress assigned to the federal judiciary the responsibility for construing all titles of the LMRDA, and designing appropriate relief for violations of each of those titles. Although petitioners and their allies pay great homage to the Secretary's "expertise," as a practical matter the Secretary's role is limited to investigating election challenges and prosecuting Title IV cases. The Secretary has no power to determine whether an election is valid or invalid or whether it should be set aside. Rather, it is the very same district courts that resolve other LMRDA controversies, including those arising under Title I, that decide whether to void an election and order a new election. And, where new elections are ordered, whenever the union resists the terms proposed by the Secretary, it is the district court that must ultimately set the terms, supervise compliance, and declare the winners. The Secretary's primary role at this stage is to provide the manpower to supervise the new election pursuant to the court order. *See, e.g.,* James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections,* 13 Harv. C.R.-C.L. L. Rev. 247, 336-37 (1978).

Under these circumstances, it is improper to assume that the district courts are going to act in contravention of the limitations built into Title IV of the Act in cases before them under other titles which may have some impact upon members' electoral rights. Indeed, because elections are required to be held periodically, there will always be an

upcoming election which will be affected in some degree by almost every decision by a court under any of the LMRDA titles. The Secretary's "expertise" is not necessary to assist the courts and assure they do not go astray in every case which may have some impact upon a pending election.

In this case, the district court did not abuse its discretion by halting the ongoing election, requiring the union to place all eligible and properly nominated candidates on the ballot, and ordering the union to run a democratic and fair election. As this Court observed in *Sadlowski,* Title I rights are particularly critical, and deserve vigorous protection, in the context of election campaigns. If the district court had concluded that the commencement of mail balloting tied its hands, it would have sent a signal to those union officials who would violate the law to gain reelection that they need only promptly initiate a mail ballot election process, which may continue over several months, during which they may get away with their chicanery without judicial interference.[13]

Within a month after the court froze the election, the union actually offered to hold a new nomination meeting and election as part of a stipulation negotiated with the plaintiffs. Pet. App. 72. As the court of appeals noted:

> the district court constructed a preliminary injunction that effected as little change as possible from [the]

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[13] *See, e.g., Marshall v. Teamsters Local 468,* 643 F.2d 575 (9th Cir. 1980)(mail ballots sent immediately after nomination meeting, returnable in 30 days); Art. XII, sec. 5(a), Constitution of National Maritime Union, provides, *inter alia:* "Voting shall commence at 9 A.M. April 1st and continue through May 31st"; *Blanchard v. Johnson,* 388 F. Supp. 208, 216 (N.D.Oh. 1975), *aff'd. in relevant part,* 532 F.2d 1074 (6th Cir.), *cert. denied,* 429 U.S. 869 (1976) (Local 47, Longshoremen's Ass'n mail ballot ordered over polling period not less than 30 days; *Sheldon v. O'Callaghan,* 497 F.2d 1276, 1279 (2d Cir.), *cert. denied,* 419 U.S. 1090 (1974)(3 month polling period in Masters, Mates & Pilots). Significant Title I violations can take place during such lengthy polling periods.

> terms which defendants found acceptable... The best course in such a case is for the parties to agree on a preliminary order, and many of the provisions of the injunction were included at the request of or with the agreement of the [union], the objecting party here.
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> The district court sought admirably to construct an injunction with as few provisions as possible offensive to defendants.

Pet. App. 74-75. Thus, in a very real sense the court did not interfere with the union's autonomy since it was the union which ultimately decided to remedy its own misconduct and proposed the means adopted by the court for doing so. Given the broad discretion conferred upon district courts to remedy Title I violations, the overall objectives of the Congress when enacting the LMRDA, and the fact the union voluntarily agreed to the relief awarded below, we respectfully submit that the remedy contested in this proceeding was not improper, and that the court did not exceed its discretion or intrude impermissibly upon the Secretary's exclusive authority under Title VI.

This case illustrates the advantages of proceeding in a Title I action to promptly remedy violations of the Act rather than to await the conclusion of an election, and an uncertain remedy under Title IV.[14] Title I remedies are

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[14]The Secretary suggests, Br. pp. 38-41, that the relief awarded in this case caused a significant delay in the election. It is quite true that the election was delayed 10 months during which time the incumbent officers remained in office. However, the Secretary concedes that a failure to place a candidate on the ballot would be cause to set aside an election under Title IV. Br. p. 33. And what the Secretary does not tell the Court is that the average delay in reruning elections set aside under Title IV is two and one-half years. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L. J. 407, 573 Appendix D (1972). The incumbent officers who are responsible for violating the Act as a means of "winning" election, remain in office during this period of delay. *See 29 U.S.C.* § 482(a)(2). In the case of local unions where elections must be held every third year, the Title IV remedy is hardly a remedy at all.

generally much less drastic and much more effective than the Title IV remedy in promoting the objectives of the LMRDA, while simultaneously accommodating the interests of unions. To the extent Title I remedies have the effect of correcting imbalances in the democratic equation, and assuring fair elections, they promote the overall objectives of the LMRDA. Indeed, Professor Clyde Summers observed that the pre-election remedies he believed to be available under the Act would have the following salutory effects:

> First, correction of invalidating defects saves the union not only the costs of a new election, but more importantly, the internal disruption caused by the lack of legitimatized leadership and the turmoil of another and more bitter campaign. * * * Second, correction of invalidating defects before the election simplifies the court's function and lightens its responsibilities.

Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1242, 1244-45 (1961).[15]

If union members are unable in Title I suits to remedy election violations until after elections have been completed, incumbent officials can generally nip democracy at the bud. In the event an election is set aside and rerun some years later, challengers often face great difficulty mounting a second serious electoral campaign. Vacations must be planned to permit campaigning, money must be raised, and a campaign organization assembled. Because incumbent officers remain in office until a new election is ordered and conducted, they can consolidate their power and, as their own employers who enjoy influential posi-

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[15] *See also* Note, *Pre-Election Remedies Under the LandrumGriffin Act: The "Twilight Zone" Between Election Rights Under Title IV And The Guarantees of Titles I and V*, 74 Colum. L. Rev. 1105, 1122 (1974); Note, *The Election Labyrinth: An Inquiry Into Title IV of the LMRDA*, 43 N.Y.U. L. Rev. 336, 351 (1968); Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 Harv. L. Rev. 1617, 1623 (1965).

tions, they are able to mount a campaign with relative ease, compared to working members. As one court put it, "Once supressed, 'the democratic spirit' within a union 'may not soon be revived.' *Navarro v. Gannon, supra,* [385 F.2d 512, 520 (2d Cir. 1967), *cert. denied,* 390 U.S. 989 (1968)]." *Schonfeld v. Penza,* 477 F.2d 899, 903-04 (2d Cir. 1973). Similarly, as the court of appeals noted below, a Title I remedy "is more flexible and potentially less disruptive than a new election, the only remedy that is possible under Title IV. Preresult judicial relief possesses other advantages over Title IV, all of which minimize the harmful effect government intervention may have on union affairs." Pet. App. 66. Of course, this is not to say that Title IV violations can or should be remedied in Title I suits. It is to say, however, that whenever Title I violations can be remedied in a way which more promptly corrects electoral violations, the courts should not hesitate to do so and thereby to promote democracy in unions — the overriding objective of the LMRDA.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below, and clarify the interplay between Titles I and IV of the LMRDA by holding that Title I confers jurisdiction upon courts to fashion and award, at any time, appropriate relief (excluding the setting aside of elections "already conducted") for Title I violations.

Respectfully submitted,

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